LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
AUG 11 1959
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 53

CLIFFORD M. DAVIS,

Petitioner,

v.

VIRGINIAN RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR THE PETITIONER

HENRY E. HOWELL, JR.
R. ARTHUR JETT
702 Royster Building
Norfolk 10, Va.,

Counsel for Petitioner

INDEX

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
Statement of the Case	5
Summary of the Argument	7
ARGUMENT	9
The Decision Below Permitting Common Law Rules of Negligence to Throttle the Rights Created by the Federal Employers Liability Act Is Inconsistent With the Decisions of This Court and Other Circuits. This Abrogation of Petitioner's Rights Should Be Rejected by This Court	9
The Decision Below Was in Conflict With the Decisions of This Court When Petitioner Was Denied the Right of a Jury Determination of Whether the Respondent Was Responsible for the Acts of the Company Doctor and Whether These Acts Were in Fact Negligent	14
CONCLUSION	17

TABLE OF CASES CITED:

Atlantic Coast Line R. R. Co. v. *Gunter*, 229 F. 2d 842 (C.C.A. 5, 1956)	13
Brock v. Gulf Mobile & Ohio R. Co., 27 S.W. 2d (S.Ct. Miss. 1954)	13
Butler v. *New York Central Railway Co.*, 253 F. 2d 281 (C.C.A. 7, 1958)	12
Dezon v. *American President Lines*, 318 U.S. 660, 63 S.Ct. 814 (1943)	8-9, 14, 15
Employers' Liability Assur. Corp. v. *Bell*, 63 F. 2d 935 (C.C.A. 3rd, 1933)	15

	Page
Gibson v. *Elgin Joliet and Eastern Railway Co.*, 246 F. 2d 834 (C.C.A. 7, 1957)	11
Knox v. *Ingalls Shipbuilding Corporation*, 158 F. 2d 973 (C.C.A. 5, 1947)	15
Lavender v. *Kurn*, 327 U.S. 645, 66 S.Ct. 749 (1946)	11
McBride v. *Toledo Terminal Rail Co.*, 345 U.S. 517, 77 S.Ct. 1393 (1957)	11
Metzger v. *Western Maryland Ry. Co.*, 30 F. 2d 50 (C.C.A. 4 1929)	15
O'Donnell v. *Pennsylvania R. Co.*, 122 F. Supp. 899 (S.D.N.Y. 1954)	14, 15
Pittsburg C., C. & St. L. R. R. Co. v. *Edwards*, 129 N.E. 310 (1921)	12
Ringhiser v. *Chesapeake & O. R. Co.*, 354 U.S. 901, 77 S.Ct. 1093 (1957)	11
Rogers v. *Missouri P. R. Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957)	8, 11
Sinkler v. *Missouri P. R. Co.*, 356 U.S. 326, 78 S.Ct. 758 (1958)	9, 16
Webb v. *Illinois Central Railroad Co.*, 352 U.S. 517, 77 S.Ct. 451 (1957)	8, 10, 11

TABLE OF STATUTES AND AUTHORITIES CITED:

Title 45, Chapter 2, Section 51	3
Title 45, Chapter 2, Section 53	3, 4
Title 45, Chapter 2, Section 54	3, 4
Title 45, Chapter 2, Section 57	3, 5
Restatement of Agency §1, p. 10	16

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 53

CLIFFORD M. DAVIS,

Petitioner,

v.

VIRGINIAN RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR THE PETITIONER

Opinions Below

The Circuit Court of the City of Norfolk's opinion and order holding that the petitioner's evidence be stricken and summary judgment entered for the respondent was an oral opinion and is not officially reported (R. 65). The decree of the Supreme Court of Appeals of Virginia affirming the judgment of the Lower Court is not reported and was given without an opinion (R. 65).

Jurisdiction

The decree of the Supreme Court of Appeals of Virginia was entered on October 10, 1958. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3).

Questions Presented

1. The Virginian Railway Company, respondent, ordered the Petitioner, Clifford M. Davis, to perform an assigned task within a limited period of time which did not permit this task to be performed at a safe working speed. This condition was aggravated by the respondent furnishing the Petitioner with inexperienced and an insufficient number of fellow employees. The Petitioner, as a result of these conditions, was unable to take proper safety precautions and slipped and fell from the top of a boxcar. Petitioner was injured when he landed on the improperly constructed and maintained right of way adjacent to the boxcar. The first question presented is whether, under these circumstances, the issue of the respondent's negligence should have been submitted to a jury.

2. The Virginian Railway Company, respondent, selected and paid salaries to physicians to treat the railroad employees of the respondent. These physicians, in addition to being paid a salary, were covered by the respondent's group insurance policy and prepared and forwarded medical reports to the respondent's claim agent and various supervisors, but not to the injured employee. These physicians would not give such a report to another party if treating a private patient. Petitioner and other employees were instructed to report to these company physicians when injured while working for the railroad. The Petitioner, following his injury, reported to one of these company physicians, where he was examined and treated. This physician ordered Petitioner to return to work before his injury was properly healed and as a result Pefitioner's injury was aggravated. The second question presented is whether, under these circumstances, the issue of the respondent's responsibility for and the negligence of this physician should have been submitted to a jury.

Statutes Involved

Title 45, Chapter 2, Sections 51, 53, 54 and 57 of United States Code Annotated, regulating railroads, in effect at the time of Petitioner's injury, are as follows (effective August 11, 1939, c. 685, Sec. 1, 53 Stat. 1404):

> Sec. 51. Liability of Common Carriers By Railroad, In Interstate Or Foreign Commerce, For Injuries To Employees From Negligence; Definition of Employees.
>
> "Every common carrier by railroad while engaging in commerce between any of the several States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in

such commerce and shall be considered as entitled to the benefits of this chapter."

Sec. 53. Contributory Negligence; diminution of damages.

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Sec. 54. Assumption Of Risks Of Employment.

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Sec. 57. Who Included In Term "Common Carrier."

"The term 'Common Carrier' as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier."

Statement of the Case

Clifford M. Davis, Petitioner, was employed by Virginian Railway Company, Respondent, as a yard conductor and on July 3, 1957, the date of his injury, the Petitioner was assigned the task of "shifting" or "spotting" various rail cars in and about the Ford Plant in Norfolk, Virginia. There were two (2) inexperienced brakemen assigned to the Petitioner to assist him in carrying out his duties.

The Ford Plant in Norfolk, Virginia, owns a spur track which connects the Ford Plant with a shifting yard and various rail outlets. One end of this spur track enters the Ford Plant and runs parallel to a loading platform. Assigned rail cars are "spotted" along this loading platform in accordance with shipping orders. The right of way along the spur track in the area where Petitioner was injured had a forty-five (45°) degree grade sloping towards the track (R. 15). Where shifting operations are carried out, it is necessary for the conductors and brakemen to mount and dismount from the rail cars while these rail cars are standing still or in motion. A safe place to work would require that this right of way be smooth and level (R. 55).

Petitioner was instructed by his superiors to perform his task during the thirty (30) minute lunch period of the Ford Plant employees (R. 10). This task involved remov-

ing all of the rail cars from the Ford Plant and "spotting" new cars from the shifting yard along the loading platform during this thirty (30) minute period. A total of forty-three (43) rail cars had to be shifted during this time. In order to carry out this task, it was necessary for Petitioner to work faster than is normally required of trainmen to carry out shifting operations (R. 57). A yard conductor and two (2) experienced brakemen would require a minimum of fifty (50) minutes to perform this job (R. 53), and Petitioner, as yard conductor, would not have been required to place himself on the boxcars, but would have carried out his assigned duties while on the ground. If the yard conductor was furnished with two (2) inexperienced brakemen, it would require a minimum of one (1) hour and ten (10) minutes (R. 54). Yet, Petitioner, was ordered to perform this task in the limited time of thirty (30) minutes. In carrying out his task, Petitioner was required to ascend to the top of one of the rail cars. One of the inexperienced brakemen then called to the Petitioner for assistance. Petitioner, moving rapidly along the top of the car towards the inexperienced brakeman, trying to carry out his assigned task, reached an open gondola which required him to descend the ladder of the boxcar next to this gondola (R. 13). Petitioner was moving so rapidly that he was unable to take proper safeguards for his safety and he slipped from the top of the ladder and fell to the ground, landing on the slope of the right of way (R. 13, 14). The effect of landing on this slanting surface brought stress to bear on Petitioner's feet and caused a fracture (R. 30).

The Petitioner, immediately following his injury, was taken to a doctor employed by Virginian Railway Company. This doctor was recommended for employment by the respondent's Chief Claim Agent (R. 9), is paid by the respondent (R. 36), is covered by respondent's group in-

surance policy (R. 47), consults with the Claim Agent regarding the settlement of claims (R. 37, 38), and furnishes medical reports to the respondent's Claim Agent instead of to the injured employee (R. 36). The railroad, by its administrative rules, directs all injured employees to report to the company doctor and it was pursuant to this rule that the Petitioner was taken to the company doctor in this case (R. 47). In addition to his duties of treating injured employees, this company doctor also gave mass flu shots to some two hundred fifty (250) employees of the respondent on the premises of the respondent (R. 50).

Respondent's doctor did not put a cast on Petitioner's injured foot and when Petitioner attempted to relieve the pain by the use of crutches, this doctor directed him not to use these crutches. Petitioner was advised that if light work could be found it would aid Petitioner's injury if he would return to work (R. 38). Acting on said doctor's instructions, Petitioner attempted to return to work and aggravated his injury.

Proper treatment of the type of fracture sustained by Petitioner required that this injury be immobilized; that no weight be placed on the foot until the fracture had properly healed. Activity would aggravate the injury and retard the healing period. If any walking activity be required by the Petitioner, crutches should be used. A cast should be placed on the foot to immobilize the same (R. 29).

Summary of the Argument

(A) The abrogation of Petitioner's right to a jury trial under the principles of the Federal Employers Liability Act by the Virginia State Courts contravened the mandate of Congress that uniform interpretation of the rights of

railroad employees be afforded, regardless of the forum. This decision must be reversed for the guidance of the State Courts involved and to eliminate a conflict with the law as laid down in other circuits and by this Court. *Rogers* v. *Missouri P. R. Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957); *Webb* v. *Illinois Central Railroad Co.*, 352 U.S. 517, 77 S.Ct. 451 (1957).

The Lower Courts took from the Petitioner his right to a trial by jury where the facts were: (1) Petitioner, a yard conductor, was required to do the work of a brakeman because the railroad furnished him with inexperienced brakemen. (2) Petitioner was required to effect a shift in thirty (30) minutes which would normally require one (1) hour and ten (10) minutes to safely perform with inexperienced help. (3) The right of way to which Petitioner dropped as he slipped while rushing to assist his inexperienced brakeman in an effort to meet the railroad's thirty (30) minute schedule, was on a forty-five (45°) degree angle and should have been flat. The added stress of landing on the slope contributed to the fracture of Petitioner's foot.

(B) A doctor employed by the railroad to examine an injured employee's fitness to resume work; who consults with and reports petitioner's injury to the railroad Claim Agent; without affording Petitioner similar reports; and who is paid by railroad for such services, and in addition receives the benefits of railroad's group insurance, is an employee or agent for whose negligence railroad is responsible.

The Lower Court rulings inferred that all doctors are independent contractors and as such immunize the employer from liability for their negligence. However, this Court has held otherwise. In *Dezon* v. *American President*

Lines, 318 U.S. 660, 63 S.Ct. 814 (1943), this Court ruled that a shipowner could be responsible for the negligence of the ship's doctor. And in *Sinkler* v. *Missouri P. R. Co.*, 356 U.S. 326, 78 S.Ct. 758 (1958), this Court ruled that a broad and liberal definition should be applied to the words "employee" and "agent" as incorporated in the statute.

ARGUMENT

The Decision Below Permitting Common Law Rules of Negligence to Throttle the Rights Created by the Federal Employers Liability Act Is Inconsistent With the Decisions of This Court and Other Circuits. This Abrogation of Petitioner's Rights Should Be Rejected by This Court.

Petitioner's contention regarding the liability of respondent is founded on the premise that where Petitioner was required to perform a naturally hazardous activity with inexperienced assistance within too short a period of time, there was created an "unsafe place to work." In actuality, the respondent created "an unsafe place of work" when it required the Petitioner to carry out his task in one-half (1/2) the required time. Haste makes waste! Here, the standard of haste set by the respondent unnecessarily increased Petitioner's exposure to injury.

The Lower Court refused to recognize the guides set forth by this Court in determining whether Petitioner's case should be submitted to the jury. The Lower Court infused the common law requirement that there be a showing of a negligent or unsafe condition as the primary cause of Petitioner's injury. The only fact considered by the Lower Court was the narrow point of time when Petitioner lost his balance and fell to the ground. It completely

divorced itself from consideration of the rapid pace at which Petitioner was required to perform his task; the fact that Petitioner, as a yard conductor, would not have been required to place himself on top of the boxcars had he been supplied with experienced brakemen, and thus, would not have been in a position where he could be injured in this manner, and further, that the right of way on which Petitioner landed was improperly constructed and caused the type of injury suffered by the Petitioner. It is submitted that should all causes of action be so narrowly viewed, even by common law standards, there would rarely be a case which could be submitted to a jury.

This Court has time and again emphasized the unique role of the jury under the provisions of the Federal Employees Liability Act. In *Webb* v. *Illinois Central Railroad Company,* 352 U.S. 517, 77 S.Ct. 451 (1957) this Court set forth lines of demarcation for guidance of the Lower Court in determining whether a case should be submitted to the jury.

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the

jury is made out whether or not the evidence allows the jury a choice of other probabilities." (p. 453 S.Ct.; p. 516, U.S.)

See also *Ringhiser* v. *Chesapeake & O. R. Co.*, 354 U.S. 901, 77 S.Ct. 1093 (1957) and *Rogers* v. *Missouri P. R. Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957).

In the instant case there was present an "intimation or atmospheric indication of unwillingness to enforce the governing rules of the Act as laid down by this Court." 352 U.S. 541.

The jury, if allowed to consider the evidence presented by Petitioner, could reasonably have found a verdict for Petitioner without speculation or conjecture, even though such is permitted. *Lavender* v. *Kurn*, 327 U.S. 645, 66 S.Ct. 749 (1946). The Petitioner's assigned task was classified in railroad terminology as a "hot job" (R. 56). This task with two (2) experienced brakemen would be difficult to perform safely and in this instance had to be performed with two (2) inexperienced brakemen (R. 61). To be performed safely, this job would require a minimum of three (3) experienced brakemen (R. 64). Thus, Petitioner was required to perform his task in a hazardous manner (R. 57). A jury could reasonably infer that the unsafe manner in which Petitioner was required to carry out his assigned task could have been the effective cause of Petitioner losing his balance and suffering the injury which followed. *McBride* v. *Toledo Terminal Rail Co.*, 354 U.S. 517, 77 S.Ct. 1398 (1957); *Gibson* v. *Elgin Joliet and Eastern Railway Co.*, 246 F. 2d 834 (C.C.A. 7, 1957). The chain of causation is strengthened when one considers that the Trial Court refused to recognize Petitioner's position that had Petitioner been furnished with two (2) experienced brakemen, Petitioner would not in fact have been in a

position where he could have been injured under these circumstances (R. 36, 51, 52). If Petitioner had been furnished with the proper number of experienced brakemen, he would never have left the ground to move about on top of the boxcars (R. 12, 13). Clearly a jury could have found negligence on the part of respondent on this state of facts. *Butler* v. *New York Central Railway Co.*, 253 F. 2d 281 (C.C.A. 7, 1958). It is pertinent that the Court in this case made the following statement at page 283:

> "* * * the defendant failed to provide plaintiff and his fellow employees with a sufficient number of jacks to avoid the necessity of plaintiff removing them while the tamping machine was on the tracks over the jacks; that it failed to organize its work and to provide plaintiff with sufficient assistance so as to avoid such necessity; that it rushed plaintiff and his fellow workers in the performance of the work and thereby increased the danger and hazard; * * *"

While Virginia ignores the application of the Federal Employees Liability Act under the above circumstances, the Supreme Court of Indiana in *Pittsburg, C., C. & St. L. R.R. Co.* v. *Edwards*, 129 N.E. 310 (1921) has clearly recognized and followed the trends of this Court when it stated at page 313:

> "* * * It is the duty of the railway not to increase the perils of its servants by the inadequacy of the force employed in any particular work.
>
> In the instant case, the complaint charges that appellant violated that duty when its foreman assigned three men to operate the derrick instead of four, and, as there was some evidence to support this charge, the question thus presented, under all the circumstances shown, was clearly one of fact for the jury."

In ignoring the condition of the roadbed on which Petitioner fell, the Trial Court not only ignores the decisions of this Court, but refuses to recognize the clear and unequivocal language of the Federal Employers Liability Act, Section 51, which provides in part as follows:

> "* * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The evidence established that the roadbed adjacent to the tracks where switching operations were to be performed should be level and smooth, but that this roadbed was rough and had an improper incline of about forty-five (45°) degrees sloping down to the tracks (R. 15, 55). Clearly, respondent violated a duty owed to the Petitioner which should have been submitted to the jury for determination. *Atlantic Coast Line R. R. Co.* v. *Gunter*, 229 F. 2d 842 (C.C.A. 5, 1956). Here the Court noted at page 844:

> "* * * switching operations were going on over it, operations which required the switchmen to alight from moving trains and obligating the company to use reasonable care to furnish a reasonably safe footing for such alighting."

Although the right of way along the spur track was controlled by the Ford Motor Company, the respondent was not excused from its nondelegable duties to furnish Petitioner a safe place to work. *Brock* v. *Gulf Mobile & Ohio R. Co.*, 27 S.W. 2d (S.Ct. Miss. 1954).

The Decision Below Was in Conflict With the Decisions of This Court When Petitioner Was Denied the Right of a Jury Determination of Whether the Respondent Was Responsible for the Acts of the Company Doctor and Whether These Acts Were in Fact Negligent.

The Respondent admittedly did not exercise control over the method of treatment by the doctors it selected. Yet, it selected and controlled all other activities of these doctors in an effort to control and be informed of the nature of injuries suffered by its employees. This would present a tactical advantage, should these injuries become the subject of litigation. On the narrow issue of control of the actual treatment, the Lower Court ruled as a matter of law the respondent would not be responsible for the acts of this doctor (R. 28, 48, 50, 65). This is in conflict with the decisions of this and other Courts. *Dezon* v. *American President Lines*, 318 U.S. 650, 63 S.Ct. 814 (1943); *O'Donnell* v. *Pennsylvania R. Co.*, 122 F.Supp. 899 (S.D.N.Y. 1954).

The doctor selected by respondent had an office, which the doctor personally selected and was not located on the premises controlled by the respondent (R. 8). However, this doctor was selected and recommended for employment by the respondent's Chief Claim Agent (R. 7), is paid a salary by the respondent (R. 36), and is covered by the respondent's group insurance policy (R. 47). The doctor furnishes medical reports for the injured employee to the respondent's Chief Claim Agent (R. 38), but admittedly would not furnish such reports to a third party if the patient was not the respondent's employee (R. 37) and discusses the settlement of these claims with the Claim Agent (R. 37). Respondent's doctor advised as to when Petitioner should resume his duties for respondent. By

its rules, respondent directs that all employees injured while in the course of their employment report to its company doctor (R. 47). It is submitted that on these facts the issue as to whether the respondent was responsible for this doctor's acts should have been submitted to the jury. *Employers' Liability Assur. Corp.* v. *Bell*, 63 F. 2d 935 (C.C.A. 3rd, 1933); *Knox* v. *Ingalls Shipbuilding Corporation*, 158 F. 2d 973 (C.C.A. 5, 1947).

Respondent will emphasize the holding in *Metzger* v. *Western Maryland Ry. Co.*, 30 F. 2d 50 (4 C.C.A. 1929). However, Metzger does not meet the later decision of this Court in *Dezon* v. *American President Lines*, 318 U.S. 660, 63 S.Ct. 814 (1943). At page 668 of 318 U.S., this Court stated:

> "To provide a ship's physician was therefore no mere act of charity. The doctor in treating the seaman was engaged in the shipowner's business, it was the ship's duty that he was discharging in treating the injured eye. While, no doubt, the physician recognized at least an ethical obligation between himself and the patient, he was performing the service because the ship employed him to do so, not because the petitioner did. He was not an independent practitioner, called to treat one whose expenses the ship agreed to make good."

The *Metzger* decision was also rejected in *O'Donnell* v. *Pennsylvania R. Co.*, 122 F.Supp. 899 (S.D.N.Y. 1954).

It is submitted that the doctor here involved was under the circumstances, an employee and not an independent contractor. However, Petitioner points to several other matters in connection with this phase of the case which clearly show that the doctor's status with the railroad was such that it must answer for his negligence.

The very statute here involved provides:

> "Every common carrier by railroad * * * shall be liable * * * for such injury * * * resulting in whole or in part from the negligence of any of the *officers, agents* or employees of such carrier * * *" (Italics supplied.)

It is difficult to imagine a more inclusive statute. Congress has put a stop in all the loopholes the ingenuity of counsel could suggest in this sphere for avoiding liability for the negligence of those who work for the railroad. Thus, assuming, *pro arguendo*, that Dr. Leigh was not an employee of the railroad (which he undoubtedly was) he was at least its agent when he examined the Petitioner and treated him. It does not matter whether under common law the railroad would be responsible for this agent's negligence; being an agent, the railroad is made responsible for his acts of negligence by the mandate of the statute. It thus is of no moment whether the doctor was an independent contractor or an employee. He was an *agent* and the railroad is liable for his negligence. See *Restatement of Agency* §1, p. 10. Thus, here, the railroad is liable not merely for the act of a fellow employee, but for the acts of agents it hires whose conduct is negligence that results in injury to employees. This broadened concept has been given just recognition by the decision of this Court in *Sinkler v. Missouri P. R. Co.*, 356 U.S. 326, 78 S.Ct. 758 (1958).

However, the evidence in this case is such that one need not give an "accommodating scope" to the word "agent" or "employee" to find that the doctor in the instant case was such.

It is further submitted that the testimony introduced on behalf of the Petitioner required a jury's determination

of the issue of the company doctor's negligence. This doctor advised Petitioner to use his foot (R. 38), did not immobilize the injured foot and forbid him to use crutches (R. 38). The Petitioner was advised by this doctor to report back to work. The doctor further testified that despite the fact that there would not be complete healing for at least six (6) weeks (R. 42) that further X-rays were not taken before advising Petitioner to return to work, although this is the usual and normal custom of treating such an injury (R. 42). An orthopaedic specialist testified that it was improper treatment for such an injury to advise the Petitioner on the fifth (5th) day of the injury to use his foot and not to use crutches; that the proper treatment for such an injury would be to immobilize the member until it has healed sufficiently to bear weight without jeopardy of its healing (R. 28, 29). This doctor further testified that Petitioner's injury was aggravated and the healing process retarded by Petitioner's returning to work as advised by respondent's doctor (R. 29).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decisions of the Circuit Court of the City of Norfolk, Virginia, and the Supreme Court of Appeals of Virginia should be reversed.

Respectfully submitted,

HENRY E. HOWELL, JR.
R. ARTHUR JETT
702 Royster Building
Norfolk 10, Va.,
Counsel for Petitioner.